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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States**October Term, 1976****No. 76-543**

IN RE: CBS LICENSING ANTITRUST LITIGATION

RECORD CLUB OF AMERICA, INC.,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.,

Respondents.

RECORD CLUB OF AMERICA, INC.,

Petitioner,

vs.

A & M RECORDS, ET AL.,

Respondents.

RECORD CLUB OF AMERICA, INC.,

Petitioner,

vs.

KINNEY SERVICES, INC., ET AL.,

*Respondents.*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**PETITIONER'S REPLY BRIEF**MELVIN LASHNER
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PETITIONER'S REPLY BRIEF

The purpose of this reply brief is to help clear up the smoke screen created by the defendants' highly-skilled legion of lawyers through innuendo and misstatements. Rather than succumbing to the temptation to correct every

such misstatement and innuendo, RCOA will confine itself to correcting only those that are most egregious, on matters central to the issues before this Court.

I.

The Court of Appeals Decision is in Direct Conflict with Daiflon and the Intended Purpose of Rule 33(c).

As pointed out in RCOA's Petition, the Court of Appeals decision is in direct conflict with the Tenth Circuit decision in *Daiflon, Inc. v. Allied Chemical Corp.*, 534 F. 2d 221 (1976), a case directly on point and identical to these cases in every material respect—even though the Court of Appeals for the Third Circuit, in its opinion below, ignored *Daiflon*, mentioning it only in one sentence (at the end of a seemingly unrelated footnote), and saying only that, in that Court's view, *Daiflon's* record "is quite different from that in this case" (P. 34a)¹.

In other words, the Court of Appeals never showed any way in which *Daiflon* was different and the defendants' attempts to distinguish that case (R.B. 19-20)² are unsupported by the facts. As in *Daiflon*, there was no evidence introduced by the defendants which controverted plaintiff's evidence that the information sought was available from plaintiff's books and records. Furthermore, as in *Daiflon*, there was no evidence before the Court which would have supported a determination that the burden of ascertaining the information would not have been substantially the same for defendants as for plaintiff—and Rule 33(c) reads "substantially the same," not "substantially less" as implied by defendants (R.B. 20).

¹ References preceded by "P." are to pages of the Petition.

² References preceded by "R.B." are to pages of the Respondents' Brief in Opposition.

True, CBS did introduce affidavits (which predated RCOA's Rule 33(c) election and Mr. Lewis' affidavit), stating that, from the (unspecified) RCOA documents they had reviewed, it was not possible to calculate the cost of records, tapes and merchandise to RCOA. However, even though these affidavits were erroneously assumed to have meant that it was not possible to calculate such cost from RCOA's books and records,³ these affidavits do not actually controvert Mr. Lewis' affidavit, which states that such information could be calculated from the RCOA documents specified in that affidavit. CBS, by the way, never introduced any evidence indicating that Messrs. Gilbert and Strauss had ever seen the documents specified in Mr. Lewis' affidavit. In fact, two CBS hired accountants, Joseph Saunders and William Woodson (and a CBS accounting team), had seen the documents specified in Mr. Lewis' affidavit (before Messrs. Gilbert and Strauss visited RCOA), but, "mysteriously", neither Mr. Saunders nor Mr. Woodson submitted an affidavit indicating that it was not possible to calculate such information from the RCOA documents they had seen.

³ If the Gilbert and Strauss affidavits are interpreted as standing for the proposition that the cost interrogatories could not be answered from RCOA's books and records, their affidavits are both impeached by Appendices C and D to the Petition, which Appendices consist of documents prepared by Mr. Strauss. Those documents, which were not presented earlier only because they were just recently obtained by RCOA (RCOA's President having never had access to them until late August of 1976), deal with RCOA's costs, as well as its sales, despite the defendants' representation to the contrary (R.B. 17, footnote). For example, Schedule 6 to Appendix D lists such items as: "Cost", "Cost of Goods Sold", and "Estimated Cost Per Collated Unit". (Certain other cost-related items are not as obvious.) The fact that the documents deal with a later period than that covered by the CBS cost interrogatories is irrelevant, for the documents nevertheless show that the information can be ascertained from RCOA's books and records. The invoices and vouchers used were not the identical ones from which the earlier cost interrogatories could have been answered, but they were comparable—and Mr. Strauss was able to compile comparable information from them.

In *Daiflon*, the Court found no evidence to support a determination that a substantial difference in the burden of compiling the desired information existed. Here, too, there is no such evidence. The only evidence with respect to comparative burden is Mr. Lewis' above-mentioned affidavit in which he swore that while the burden "would be mammoth, the burden of deriving or ascertaining information would fall substantially the same on CBS, which has sought the information and which would be the beneficiary thereof, as it would upon RCOA." This sworn statement was not challenged by CBS since the Gilbert and Strauss affidavits, the only evidence introduced by CBS on Rule 33(c) standards, do not mention the relative burden between CBS and RCOA of compiling data. (In its memorandum of law to the District Court, CBS's counsel argued the burden would be greater to CBS than on RCOA, but presented no evidence to support the argument.)⁴

Actually, in a sense, the relative burden was anything but equal—it was much heavier on RCOA than it would have been on CBS. At the very height of its success, RCOA had a tangible net worth of one million dollars. (Thus, it was always a small company compared with its competitors: CBS, which, through its Columbia House division, now has approximately an 80% share of the U.S. record club market; Westinghouse Electric Corp.; and RCA Corporation.) As a direct result of the District Court's refusal to permit RCOA to exercise its option

⁴ The District Court made no mention of the comparative burden—or of Rule 33(c). The Court of Appeals, hopelessly confused as to which documents RCOA specified as those containing the information requested in the cost interrogatories, only said the burden was not substantially the same "if the print-outs were to be the sole business records supplied to defendants" (P. 34a). The *business records specified* by RCOA consisted of invoice and voucher records; they *did not include any print-outs*, even though the defendants have attempted to spread the Court of Appeals' confusion to this Court (R.B. 13 and 17).

under Rule 33(c), RCOA spent more than \$100,000 (exclusive of legal fees and expenses), an amount equal to approximately 10% of its tangible net worth, in responding to the cost interrogatories. Such expenditure was an unconscionable burden on RCOA, which is now in Chapter XI. On the other hand, to CBS and the other defendants, which have multi-billion dollar sales and a combined net worth approximating a billion dollars, the expenditure of \$100,000 would have merely been another drop in the bucket. Actually, RCOA's expenditure of \$100,000 was comparable to the defendants' expenditure of one hundred million dollars.

To accuse RCOA of "flagrant bad faith" (R.B. 20) when RCOA was unconscionably forced to incur expenses equal to 10% of its tangible net worth as part of a discovery exercise is part of the defendants' continuing effort, evident throughout these proceedings, to paint RCOA as a villain in order to distract the Courts' attention from the underlying issues and to prejudice the Courts in the defendants' favor.

In any event, RCOA met the requirements of Rule 33(c), the record could not support a finding that either condition of Rule 33(c) was not met, there was no finding that either condition was not met, and, as in *Daiflon*, the District Court erred in refusing to permit the plaintiff to rely on Rule 33(c).

Actually, in attempting to analogize this case to *National Hockey League v. Metropolitan Hockey Club, Inc.*, 96 S. Ct. 2778 (1976), the defendants (and the Courts below) "overlooked" one of the main issues in this case—Rule 33(c). In *National Hockey League* the complaint was dismissed because the plaintiff therein had *failed to substantially answer crucial interrogatories*. In this case, however, *RCOA did answer the interrogatories by invoking the business records option available to it under the then new Rule 33(c)*.

Although the District Court characterized RCOA's election of such option as tantamount to no answer at all and as seeking "to shift the burden" (P. 3a), Rule 33(c), itself, expressly provides that specifying the records from which answers to interrogatories may be derived and affording the interrogator the opportunity to examine and copy such records constitutes "*a sufficient answer.*" Thus, RCOA did sufficiently answer the interrogatories.

Even if this Court were to agree with the District Court that the invocation of the business records option under Rule 33(c) is tantamount to no answer at all, however, *National Hockey League* would still be distinguishable from this case because, even forgetting RCOA's "Rule 33(c) answer", the interrogatories here would *not* have been *substantially unanswered*. Quite the contrary, as a result of the District Court's rejection and characterization of RCOA's election of the Rule 33(c) option as no answer, RCOA compiled (at a cost of more than \$100,000) and submitted 9,000 pages of computer print-outs setting forth the information requested in the interrogatories!

After that answer was submitted, first CBS complained that certain prefix digits were not included, even though they were irrelevant⁵ and even though CBS, a supplier to RCOA, had as much access to such prefix digits as RCOA. Then, after RCOA added the additional, though irrelevant, requested information, CBS, knowing RCOA had just filed in Chapter XI, jumped on RCOA, claiming that much of the information was either omitted or erroneous, and had this case dismissed, without a hearing, on the basis of the al-

⁵ Both lower Courts mistakenly thought the prefix digits were relevant because they, for some reason, thought the prefix digits were necessary to determine RCOA's cost of acquiring records and tapes (P. 8a, footnote 9, and P. 35a-36a). However, such costs were set forth in the print-outs as originally filed and had nothing to do with the prefix digits.

leged, but unproven, errors. Had there been a hearing, RCOA might have had the opportunity not only to show that the error rate was less than 1%, but also to inquire as to why it was "necessary" for RCOA to supply the prefix digits if CBS had such prefix digits so readily available that CBS could support its untested, quickly-made allegation that RCOA had supplied incorrect prefix digits. Perhaps it was only "necessary" because CBS knew RCOA was about to buckle under—after seven years of costly, "gaming" anti-trust litigation.

In any event, since RCOA had sufficiently answered the interrogatories in accordance with Rule 33(c)—and had, in addition, answered by producing a one hundred thousand dollar, 9,000 page compilation of the requested information, a compilation never actually shown to have contained *any* errors—the record in this case could not support a finding that the crucial interrogatories in this case remained substantially unanswered and, therefore, this case is not controlled by *National Hockey League*.

II.

The Kinney Case was Dismissed as Punishment for the CBS Case.

The defendants claim the Kinney Case was dismissed because RCOA did not comply with the District Court's November 1, 1974 order in the Kinney Case (R.B. 21), but they fail to mention that RCOA complied with that order (on time) with respect to Kinney (and although Kinney, knowing RCOA had just filed in Chapter XI, claimed RCOA's response was inadequate, Kinney never offered any proof of such contention). The fact is that, as the language quoted by the defendants (R.B. 21) from the Court

of Appeals decision indicates, the District Court dismissed the Kinney Case as punishment for RCOA's alleged conduct in the CBS Case.

CONCLUSION

For each of the foregoing reasons, and for the reasons set forth in our petition, the petition for certiorari should be granted.

Respectfully submitted,

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